United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: April 22, 2015

TO: Dennis P. Walsh, Regional Director
Region 4

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Au Bon Pain at Philadelphia Airport
Case 04-CA-141681

512-5006-5050
512-5006-5063
512-5006-5065

This case was submitted for advice as to whether the Region should issue complaint alleging that the Employer violated Section 8(a)(1) of the Act by making statements to employees regarding the effect that unionization would have upon the lines of communication between management and employees. We conclude that the Employer's statements are lawful under the Board's *Tri-Cast* doctrine,[1] and that that they would be lawful even under the Board's case law prior to *Tri-Cast*.[2] Accordingly, the Region should dismiss the instant allegation, absent withdrawal.

FACTS

Au Bon Pain ("Employer") operates over 300 café bakeries worldwide, including four located at the Philadelphia International Airport. In June 2014,[3] UNITE HERE Local 274 ("Union") began organizing the food service employees at the Employer's four Airport locations. The Employer learned of the Union's organizing activities on September 13 and promptly began to campaign against the Union.

On September 13 and 15, high-ranking Employer officials conducted meetings with employees. Shortly after these meetings, the Employer sent each employee a follow-up letter documenting some of the issues discussed at those meetings and

[1] 274 NLRB 377 (1985).

[2] FOIA Ex. 5 [redacted]

[3] All dates are 2014 unless otherwise noted.

arguing against the need for union representation. In the letter's opening paragraph, the Employer's CEO stated:

> As we tried to convey to you, I strongly believe that a union is not the answer to issues that may exist, and ask you to consider whether you really want a union to be your spokesperson instead of having a direct line to any level of management, right up to me.

In the letter's third-to-last paragraph, the Employer also stated that "[t]he answer, however, is not a union – the reality is that unions only increase the divide between management and employees." And in the second-to-last paragraph of the letter, the Employer informed employees that there would be additional meetings to discuss "why we feel that you are better off to continue to communicate directly with us, and why we think that it is a bad idea to vote for Unite Here to represent you."

The Union filed several unfair labor practice charges regarding the Employer's conduct during its anti-Union campaign. The Region found merit to some of those allegations.[4]

ACTION

We conclude that Employer's statements are lawful under the Board's *Tri-Cast* doctrine, and that even under the Board's case law prior to *Tri-Cast*, the Employer's statements would be considered lawful.

Before *Tri-Cast,* the Board held that employer statements that misrepresented employees' Section 9(a) right to deal directly with the employer after designation of an exclusive union representative violated Section 8(a)(1) or constituted objectionable preelection conduct.[5] The Board typically characterized employer statements

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[4] Specifically, the Region has concluded that the Employer violated Section 8(a)(1) of the Act by promising to remedy employee grievances and to pay for an employee's child care expenses. The Region further concluded that the Employer violated Section 8(a)(3) by disciplining one employee. The remaining allegations lacked merit and were withdrawn.

[5] *See, e.g.*, *Joe & Dodie's Tavern*, 254 NLRB 401, 406, 411 (1981) (Board affirmed ALJ's conclusion that employer's statements that employees "absolutely cannot" deal directly with employer because employer was "legally obligated to deal solely" with union conveyed an "erroneous statement of the law" and threatened loss of benefits in violation of Section 8(a)(1)), *enfd.* 666 F.2d 383 (9th Cir. 1982); *LOF Glass, Inc.*, 249 NLRB 428 (1980) (employer's statement that "the right and the freedom of each of you

misrepresenting employees' Section 9(a) rights as threats of the loss of an existing benefit, since Section 9(a) guarantees that employees who were allowed to approach their employer directly when they were unrepresented will be able to do so after they unionize.[6] To determine whether such employer statements were misleading and coercive, the Board often considered the context and circumstances in which the

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to come in and settle matters personally would be gone" was a "serious misrepresentation" of employees' right under 9(a) and objectionable conduct sufficient to warrant setting aside election); *Colony Printing and Labeling*, 249 NLRB 223, 224 (1980) (employer's statements that "[i]f you sign your name to a union card, you give up the right to talk to us ... [w]hen you sign, you give away your right to talk to us about your pay, your benefits, the hours you work, and about your job" were "misstatements of the law [that] constitute threats … to curtail employee rights and discontinue employee benefits" violative of Section 8(a)(1)), *enfd.* 651 F.2d 502, 504 (7th Cir. 1981). *Compare Westmont Eng'g Co.*, 170 NLRB 13, 13 (1968) (employer's statement that employer must handle any grievances through union if union won election, although not "entirely accurate," was not coercive and did not violate Section 8(a)(1)).

[6] *See, e.g.*, *Associated Roofing & Sheet Metal Co.*, 255 NLRB 1349, 1350 (1981) (employer's statement that "the right and freedom of each employee to come in and settle matters personally would be gone" was threat to terminate existing benefit and constituted objectionable conduct); *Joe & Dodie's Tavern*, 254 NLRB at 406, 411; *Armstrong Cork Co.*, 250 NLRB 1282, 1282 (1980) (employer's statement that "you will decide whether you want to give up your right to … deal directly with me or your supervisor as you have in the past" was unlawful threat of loss of existing benefit and objectionable); *Sacramento Clinical Laboratory*, 242 NLRB 944, 944 (1979) (employer's statement that employee would no longer be able to talk with employer but must go "through channels" was a "clear misstatement" of Section 9(a) and an unlawful threat of loss of benefits), *enforcement denied in relevant part* 623 F.2d 110, 112 (9th Cir. 1980); *Graber Mfg. Co.*, 158 NLRB 244, 246-47 (1966) (Board affirmed ALJ's finding that employer's statement that union vote would determine whether employees would "continue to talk about your own job affairs *personally* or a third party—the [u]nion—will do your talking for you, to *your exclusion*" violated Section 8(a)(1) because it threatened loss of existing benefit) (emphasis in the original), *enfd.* 382 F.2d 990 (7th Cir. 1967). *Cf. K.O. Steel Casting, Inc.*, 172 NLRB 1837, 1837 (1968) (employer's statement that union would "break up our home, so to speak, because we would not be dealing together, but would have to deal through a third party" was not a threat of retaliation but rather employer's opinion).

statements were made, including employer warnings that its relationship with employees would deteriorate if the employees chose representation.[7]

Later, in *Tri-Cast*, the Board changed course and held that statements by employers to employees indicating that their relationship will change if employees select union representation are permissible if they are not made in conjunction with a threat, either explicit or implied.[8] There, the employer made statements in a letter to its employees informing them that if the union were to come in, the employer's policy of working with employees "on an informal and person-to-person basis" would change.[9] The employer also informed employees that it would have to adhere to policies "by the book, with a stranger" and would be unable to "handle personal requests as we have been doing."[10] The *Tri-Cast* Board disagreed with the Regional Director's finding that the employer's statements misrepresented employee's Section 9(a) rights and thereby amounted to an objectionable threat to revoke an existing employee benefit.[11] Instead, the Board concluded that the employer's statements did not amount to unlawful threats but, rather, explained the employer's view of how its relationship with the employees would change if they unionized.[12]

Since *Tri-Cast*, the Board has applied the *Tri-Cast* rationale broadly, privileging employer statements that, unlike those in *Tri-Cast* itself, were direct misrepresentations of employees' rights guaranteed by Section 9(a). For example, in *United Artists Theatre* and *SMI Steel*, the Board found lawful employer statements that, unlike the statements in *Tri-Cast*, did not merely predict a change in the

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[7] *See, e.g.*, *Greensboro News Co.*, 257 NLRB 701, 701 (1981) (employer's statement that although at present, supervisors and managers could deal with employees as individuals, if the union came in employer "must deal with [union], not you" was, in the context of other statements that employees would be "worse off," an unlawful threat to terminate existing beneficial situation); *Tipton Elec. Co.*, 242 NLRB 202, 203, 205-206 (1979) (Board affirmed ALJ's finding that employer violated Section 8(a)(1) with statement that employees could "no longer go directly to management" and conveyed message that employer's harmonious relationship with employees would cease if union voted in), *enfd.* 621 F.2d 890, 892 (8th Cir. 1980).

[8] *Tri-Cast*, 274 NLRB at 377.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *See id.*

employers' relationships with their employees, but rather explicitly conveyed to employees that they would not have the rights provided by Section 9(a) if they voted for representation.[13]

More recently, in *Dish Network*, the Board applied the *Tri-Cast* principles to find that the employer did not violate Section 8(a)(1) by informing employees that if they selected the union they would be "limited in bringing concerns to management."[14] In a separate concurrence, Member Block stated her belief that the Board should reexamine *Tri-Cast* in a future case.[15] She suggested that *Tri-Cast* has come to stand for the proposition that any employer statement regarding the impact of unionization on employees' ability to individually pursue grievances is permissible, including statements that "implicitly misstate" the law by telling employees that if they chose union representation they would lose the right to individually approach management with complaints. She noted that this is in tension with the proviso to Section 9(a), which makes clear that the union's exclusive status does not prevent employees from bringing grievances to management on their own.[16] Member Block cited to cases decided prior to *Tri-Cast*, where the Board consistently held that employer statements that employees would lose the right to go directly to management if they chose union representation were unlawful.[17] The Board had typically viewed such statements as a

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[13] *See United Artists Theatre,* 277 NLRB 115,115 (1985) (Board dismissed Section 8(a)(1) allegation challenging employer's statements that if the union won, the employer would be "obligated by law to discuss grievances only with the [u]nion, not with you" and that they would vote away their rights to deal directly with management); *SMI Steel*, 286 NLRB 274, 274 n.3 (1987) (Board found lawful an employer's statement that if employees voted for union, they would "not be permitted" to go to employer's front office to talk "because you would be prevented from doing that under the contract"); *See also Ben Venue Laboratories*, 317 NLRB 900, 901-902 (1995) (Member Browning, dissenting in part) (rationale underlying *Tri-Cast* does not privilege employer statements that go beyond explicating a change in the employer-employee relationship by threatening total elimination of employer's open-door policy), *enfd. mem.* 121 F.3d 709 (6th Cir. 1997).

[14] *Dish Network*, 358 NLRB No. 29, slip op. at 1, n.1, *supplemental decision,* 359 NLRB No. 32 (Dec. 13, 2012) (finding Board had authority to revisit *Tri-Cast* in the instant case, but declining to do so).

[15] *Id.,* slip op. at 1.

[16] *Id.*, slip op at 1-2.

[17] *Id.,* slip op. at 2, n.3.

threat to take away existing benefits.[18] She pointed out that in *Tri-Cast,* the Board had "departed from this principle, with minimal analysis,"[19] and stated that the Board should reexamine its *Tri-Cast* doctrine in another case where the issue is squarely presented.[20]

In the instant case, the Employer's statements that unionization would affect employees' lines of communication and that unions increase the divide between employees and management are clearly privileged under the Board's *Tri-Cast* doctrine. Similar to the employer's statements in *Tri-Cast*, here the statements in the Employer's letter merely explain how its relationship with employees, including the manner in which employees and management deal with one another, might change if a union is selected. Under current Board law, such statements are not characterized as objectionable threats to deprive employees of their rights and therefore are lawful.[21]

Even under the Board's pre-*Tri-Cast* analysis, we do not view the identified statements as explicit misrepresentations of employee rights under Section 9(a) or threats of a loss of benefit in violation of the Act. First, we find that the statements contained in the Employer's letter are ambiguous and open to a number of interpretations. In this regard, we contrast the instant case with *Tipton Electric Co.*,[22] a pre-*Tri-Cast* decision where the Board held that the employer violated Section 8(a)(1) when it made statements to employees to the effect that that they

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[18] *Id*. slip op. at 2. *See, e.g., Graber Mfg. Co.*, 158 NLRB at 247 ("[T]he employees' statutorily protected right to present their own grievances and thus speak for themselves is undoubtedly a right cherished by many employees and Respondent's statement that if the Union became their representative it would talk to the employer about their own job affairs to their exclusion amounted to a threat that they would lose a substantial benefit."). *See also Reidbord Bros. Co*., 189 NLRB 158, 162 (1971) (employer violated Section 8(a)(1) by telling employees that they could not "go directly to the supervisor and register a complaint" once a union became employees' representative); *Colony Printing & Labeling*, 249 NLRB at 224–225 (violation of Section 8(a)(1) to tell employees "when you sign, you give away your right to talk to us about your pay, your benefits, the hours you work, and about your job").

[19] 358 NLRB No. 29, slip op. at 2.

[20] *Id.,* slip op. at 1.

[21] *See Tri-Cast*, 274 NLRB at 377.

[22] 242 NLRB 202 (1979)

would "lose [their] right to speak and act as an individual" and could no longer contact management directly, "but would have to speak and act through the union."[23] Unlike the clear misstatements of the law in *Tipton Electric*, here the Employer's statements are vague and would not necessarily be read to imply that employees would lose all direct access to the Employer as a result of union representation. Rather, the ambiguous statements in this case could be interpreted merely as an expression of the Employer's opinion regarding unionization. We note finally that, in the context of the Employer's response to the Union's campaign, there is nothing to suggest that the Employer intended to convey to employees that they would be unable to approach management directly if the Union won the election. We therefore conclude that the Employer's statements are lawful even under Board law prior to *Tri-Cast*.

FOIA Ex. 5 [redacted] Accordingly, the Region should dismiss the instant allegation, absent withdrawal.

/s/
B.J.K.

[23] *Id.* at 205-06.